LCI International

Worldwide Telecommunications

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Federal Communications Commission
Office of the Secretary

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March 27, 1992

Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 200554

RE: CC Docket No. ~~78-72~~ (Phase I)

Enclosed please find an original and five (5) copies of LiTel Telecommunications Corporation; dba: LCI International comments in the above mentioned docket. Additional copies have been filed with the Common Carrier Bureau, and the information office pursuant to Section 1.419 of the Code of Federal Regulations.

Acknowledgment and date of receipt of this letter are request. A duplicate letter is attached for this purpose.

Sincerely,

Douglas W. Kinkoph
Manager
Regulatory Affairs

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 92-13
Tariff Filing Requirements for Interstate Common Carriers	)	
	)	

COMMENTS OF LCI INTERNATIONAL

Pursuant to Section 1.415 of the Commission's Rules and its Notice of Proposed Rulemaking, FCC 92-13, released January 28, 1992 [hereinafter "NPRM"] LiTel Telecommunications Corporations, dba LCI International ("LCI") submits these comments on the requirements for common carriers to file tariffs with the Commission under Section 203 of the Communications Act.

PRELIMINARY STATEMENT

On January 28, 1992 the Commission issued a Memorandum Opinion and Order in E-89-297 denying in part and dismissing in part AT&T's complaint against MCI relevant to MCI providing common carrier telecommunications services to several customers at rates, and on terms and conditions, that are not filed or contained in interstate tariffs, allegedly in violation of Section 203 of the Communications Act. In a companion order, the Commission released the NPRM. The Commission is requesting comments on the legality of the Commission's forbearance policy. Specifically the Commission has requested comment on the following issues:

(a) Does the Commission have authority under Sections 4(i) and 203 or other provisions of the Communications Act to continue to permit nondominant carriers not to file tariffs?

(b) If the Commission's current forbearance rule is unlawful, does it necessarily follow that all common carriers must file tariffs? If not, for what classes of carriers is forbearance permissible and for what classes is it impermissible?

(c) If the Commission's current forbearance rule is unlawful, should carriers be required to file any or all of their off-tariff service arrangements that are currently in effect? If so, in what time frame?

(d) If the Commission's current forbearance rule is unlawful, would any other Commission rules need to be changed, and if so, how should they be changed? If forbearance is found to be unlawful, should the streamlining rules in Competitive Carrier be relaxed to allow for additional streamlining for carriers currently subject to forbearance? If so, what sort of additional streamlining might be appropriate? What would be the implications of any proposed changes in commission tariffing policies for small IXCs, users, and other affected entities? What would be the implications of competition in the marketplace?

I. DOES THE COMMISSION HAVE AUTHORITY UNDER SECTIONS 4(i) AND 203 OR OTHER PROVISIONS OF THE COMMUNICATIONS ACT TO CONTINUE TO PERMIT NONDOMINANT CARRIERS NOT TO FILE TARIFFS?

By the plain and clear language of Section 203 (b)(2) the answer to the foregoing question is "Yes". Section 203 (b)(2) states that "The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." Section 203 (b)(2) clearly

permits the Commission to modify the requirements set forth under Section 203 of the Act, including Section 203 (a) which requires every common carrier to file with the Commission all charges for the services it offers. In addition Section 203(c), which restricts carriers from providing service without a published schedule of charges as required by 203(a), expressly excepts the requirement where "otherwise provided by or under authority of this Act". It is apparent that Section 203(b)(2) is the authority referenced in 203(c).

The Commission also clearly has the authority to differentiate regulations based on dominant or nondominant status. In 1979, the Commission initiated the Competitive Carrier rulemaking proceeding. In its First Report, adopted in 1980, the Commission established two classes of carriers, dominant and nondominant. Dominant carriers were those possessing market power and nondominant carriers were defined as those lacking market power. The first report defined market power as the ability to control price in the marketplace. The Commission determined that only AT&T possessed such ability and therefore is the only carrier recognized as dominant by the Commission. In its Second Report and Order in the Competitive Carrier proceeding, adopted in 1982, the Commission determined that it had the authority under the Communications Act to forbear nondominant IXCs from filing interstate tariffs so long as that action was exercised in a manner that effectuates, rather than frustrates, the Act's overriding goals.[1] Under the Commission's Second Report and Order, terrestrial resellers and specialized common

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1/ Notice of Proposed Rulemaking, 90-132, paragraph 32.

carriers were included under the Commissions forbearance policy. In 1983 the FCC released its Fourth Report and Order, under which the Commission extended its forbearance policy to all nondominant miscellaneous common carriers, domestic satellite carriers, domsat resellers, domestic operations of Western Union, International record carriers, other record carriers and IXCs affiliated with exchanged telephone companies.[2] The FCC determined in the above proceedings that its forbearance rules for nondominant IXCs would be desirable and lawful under Section 203. The reasoning used then still applies. AT&T is clearly still the dominant long-distance carrier with 1991 telecommunication service revenues of $38.8 billion dollars. "AT&T long distance serves 7 out of 10 public payphones, 19 out of the 20 top lodging chains, and 20 of the 25 largest airports in the U.S."[3] In addition, AT&T appears to have stopped any additional erosion of its market share. AT&T says, "based on estimated industry data, we stabilized our share of the total domestic market in 1991 and made progress in stabilizing our share of the international market."[4] In further support of the FCC's forbearance policy, Section 4(i) of the Communications Act states "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Clearly the forbearance policy is not inconsistent with the Communications Act.

2/ Notice of Proposed Rulemaking, 90-132, paragraph 33.
3/ AT&T 1991 Annual Report, page 12.
4/ Ibid, page 21.

While the Commission's forbearance policy exempts nondominant IXCs from filing interstate tariffs, it has not relieved nondominant carriers of other statutory requirements under Title II. For example, nondominant IXCs are still required to provide service upon reasonable request. In addition nondominant carriers remain subject to the complaint process of Section 208 if they fail to comply with these requirements. Therefore, even under the forbearance policy, IXCs still are subject to the oversight of the Commission.

In its complaint against MCI, AT&T cites MCI V. FCC and Maislin Industries, U.S., Inc. V. Primary Steel, Inc., 110 S. Ct. 2759 (1990), in support of its position that common carriers must file tariffs. In fact, neither case supports their position. In MCI V.FCC the Court vacated the Commission's decision that prohibited nondominant common carriers from filing tariffs. The Court did not rule on the legality of the FCC's forbearance policy. In Maislin Industries, U.S. V Primary Steel, the Court stated that the requirement in the Interstate Commerce Act that common carriers offer service only pursuant to filed rates was "utterly central" to the administration of the Act and could not be modified by the Interstate Commerce Commission. The Court went on to say that "without these provisions... it would be monumentally difficult .. and virtually impossible to enforce the requirement that **rates be reasonable** and **nondiscriminatory**, ... and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed

rates (emphases added)." The Maislin case stands for the proposition that tariffs were "utterly central" to determine that rates are reasonable and nondiscriminatory relative to the Interstate Commerce Act. That is not the case with nondominant interexchange carriers. The Commission clearly determined in its Competitive Carrier rulemaking proceeding that nondominant common carriers lacked market power. The Commission went on to state that "A firm without market power does not have the ability or incentive to price its service unreasonably, to discriminate among customers unjustly, to terminate or reduce service unreasonably or to overbuild its facilities." The FCC also stated that "A competitive firm, lacking market power, must take the market price as given, because if it raises price it will face an unacceptable loss of business, and if it lowers price it will face unrecoverable monetary losses in an attempt to supply the market demand at that price." The Court finding in Maislin Industries that tariffs are ""utterly central" is only applicable where carriers can charge unreasonable and discriminatory pricing. The Commission has already determined that only AT&T has the ability to engage in such behavior and is reflected by the fact that AT&T is the only carrier recognized as dominant by the Commission. As a result of nondominant telecommunication common carriers not having the ability to engage in behavior that can result in unreasonable and discriminatory rates, the Court's finding in Maislin should not be used to gauge the legality of the Commission's forbearance policy.

Congress has also approved of the Commission's forbearance policy. In 1990 Congress passed the Telephone Operator Services Improvement Act of 1990 (TOSIA). TOSIA was enacted by Congress to ensure consumers are provided operator services in a fair and reasonable manner. Section (4)(h) requires that each provider of operator services file an informational tariff with the Commission specifying rates, terms, and conditions under which their operator services will be provided. The tariff requirements set forth by Congress under TOSIA were very specific in that they required informational tariffs to be filed only by those entities providing operator services. In addition Congress provided the Commission with the ability to waive the informational tariff filing requirement set forth by TOSIA after four years if certain requirements had been met. Congress' actions demonstrate that they are aware of the Commission's forbearance policy and their inaction to change such policy constitute acceptance of that policy.

In summary, Section 203 (b)(2) and Section 4 (i) of the Communications Act clearly provides the Commission with the authority to carry out its forbearance policy. In addition, Congress, while being aware of the Commission's forbearance policy has not taken any action to prohibit it. In fact, Congress' tariff regulations established under TOSIA operate to approve of the Commission's forbearance policy.

While LCI has no doubt that section 203 (b)(2) and 4(i) provides the Commission with the applicable authority to carry out its forbearance policy, LCI questions AT&T's motive in attacking the legality of the Commission's forbearance policy. Ten years passed between the initiation of the Commission's Competitive Carrier rulemaking proceeding and the filing of AT&T's complaint against MCI in 1989. The Commission's forbearance policy along with other regulations instituted by the Commission have helped to move the long-distance market closer to a more level and truly competitive marketplace. Obviously AT&T does not want a level playing field. Instead AT&T wants to eliminate all other carriers from the playing field. The Commission must not reverse its forbearance policy. Elimination of the Commission's forbearance policy will permit AT&T to elude the Commission's oversight that is necessary to allow the long-distance market to continue and evolve toward a truly competitive playing field. AT&T will be able to elude Commission oversight because existing Commission staff currently responsible for oversight of AT&T as well as a few other long-distance carriers who voluntarily elect to file tariffs with the Commission will have to deal with an influx of tariffs from approximately 631 new long-distance carriers.[5] This enormous workload will reduce the resources available to oversee AT&T, thereby, allowing AT&T to escape the oversight necessary for a level playing field to evolve.

5/ Trends in Telephone Service, Industry Analysis Division, FCC (February 1992).

II. THE AMOUNT OF REGULATION THAT SHOULD BE IMPOSED UPON NONDOMINANT CARRIERS IF THE COMMISSION'S CURRENT FORBEARANCE POLICY IS FOUND TO BE UNLAWFUL.

Assuming, arguendo, that the Commission decides to reverse its forbearance policy and requires nondominant carriers to file interstate tariffs, the Commission must maintain a clear distinction between AT&T and all other common carriers. LCI believes that the regulations governing the tariff filings of nondominant carriers should be substantially reduced from the regulations governing the tariff filings of dominant carriers. LCI recommends the following relative to nondominant tariff filings:

1. No cost support for tariff filings.
2. All rates should be presumed legal.
3. Rates become effective upon filing.
4. Substantially reduced filing fees.
5. Annual tariff revision (rather than event-by-event) for changes other than rate increases.

LCI believes that such a reduction of nondominant tariff regulations is justified on the basis that the Commission has already determined that nondominant carriers do not possess market power, and therefore, do not have the ability or incentive to price its service unreasonably or to discriminate among customers. Section 203 (b)(2)provides the Commission with the ability to implement the proposed tariff regulations as set forth above.

The Commission should also reject any policy that would require nondominant carriers to file their off-tariff service arrangements that are currently in effect. LCI believes that if the Commission reverses it position, nondominant carriers should only be required to file tariffs that reflect general

service offerings. All off-tariff contractual offerings should be excluded from all filing requirements. The intent of requiring carriers to file tariffs for interstate services is based on the premise that the Commission can determine if the rates being charged by a carrier are just and reasonable. Customers who enter into an off-tariff contractual agreements with a nondominant carrier are clearly aware of the charges that the carrier will be billing them. In addition, a customer will only enter into such an agreement if the rates proposed by the carrier are just and reasonable. The Commission has already determined that nondominant carriers do not possess the market power to price services that are unreasonable or to discriminate among customers unjustly. Therefore, LCI believes that there is no basis to require off-tariff contracts to filed with the Commission.

CONCLUSION

The Commission's forbearance policy does not violate Section 203 of the Communications Act. Section 203 (b)(2), which permits the the Commission at its discretion to modify any requirement made by or under the authority of Section 203, makes this clear. Moreover, the Commission thoroughly reviewed this issue previously in its Competitive Carrier rulemaking proceeding. The Commission determined in that proceeding that forbearance was desirable and legal under Section 203. The long-distance market has not changed in such a manner that should cause the Commission to reverse its forbearance policy. AT&T is clearly still the dominant

long-distance carrier with telecommunication revenues of $38.8 billion in 1991. The Commission must also realize that Congress, while being aware of the Commission's forbearance policy, has taken no action to eliminate it. In fact Congress' action under TOSIA indicates acceptance of the Commission's forbearance policy.

Respectfully submitted,

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dba: LCI International

By _____

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